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No. 1045.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD COMPANY;
CENTRAL TRUST COMPANY OF NEW YORK;
D. O. MILLS AND HOMER S. KING, AS TRUSTEES,
Defendants and Appellants,

VS.

THE UNITED STATES,
Complainant and Appellee.



## Appellants' Brief.

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*Counsel for the Defendants.*

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Clerk.

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VS.

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## Appellants' Brief.

This is an appeal by the above-named defendants, from so much of the decree as injuriously affects them, entered in suit No. 979 on the docket of the United States Circuit Court for the Southern District of California, brought in behalf of the United States against these defendants and other persons who have not appealed.

The suit was brought to cancel patents issued to the Southern Pacific Railroad Company, for lands described

in the bill, in so far as such lands were not held by purchasers from the said Company, whose title stood confirmed by the Act of Congress of March 2nd, 1896 (29 Stats. 42); and to recover $1.25 per acre from the said Company for all such lands sold by it to purchasers whose titles stood confirmed by that Act.

The case was dismissed as to certain of the lands (Tr., Vol. 1, p. 106).

The decree finds **(a)** that all the remaining lands of the bill were *sub judice* (because of the "Jurupa" Mexican Grant claim) at the time the Southern Pacific grant (under which the land patents were issued) took effect; **(b)** cancels the Southern Pacific Railroad Company's patents for all lands in suit not sold by it otherwise than by trust deeds to the other appellants herein; **(c)** confirms the title of all purchasers from the Southern Pacific (other than these appellants) of lands in suit; and **(d)** gives judgment against the Southern Pacific Railroad Company at the rate of $1.25 per acre, with interest, for all lands in suit sold by it to persons whose title is declared confirmed by the decree.

It will be observed that the Southern Pacific received considerably less than $1.25 per acre from Michael Craig (Tr. Vol. 1, p. 100), whose title is confirmed and charged to the Southern Pacific at $1.25 per acre (Tr., Vol. 1, p. 118).

This appeal is from all of the decree other than such parts thereof as confirms the title purchased from these appellants. (See Assignment of Errors, Tr., Vol. II, p. 627).

## POINTS OF CONTENTION.

This appeal is based on the following contentions:

I. None of the lands in suit were *sub judice* at the time the Southern Pacific land grant attached; hence the Circuit Court erred in adjudging cancellation of the patents therefor.

II. The Act of March 2nd 1896, gratuitously and unconditionally confirmed the title conveyed by the patents in suit, to all lands at that time held by purchasers in good faith from the Southern Pacific Railroad Company; from which it follows that those patents could not be canceled in this suit, whether true or untrue that they were erroneously issued.

III. Were it true that the patents complained of were erroneously issued, still complainant is not entitled to recover any price for lands in suit sold by these appellants, because **(a)** by Act of March 2nd 1896, Congress gratuitously and unconditionally confirmed the title thus sold and conveyed; **(b)** the demand for such payment is *in assumpsit,* at law; and **(c)** the Southern Pacific Railroad Company has not received, these lands included, the quantity of land granted by its granting Act.

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## ARGUMENT.

### I.

**None of the lands in suit were sub judice at the time the Southern Pacific land grant attached; hence the Circuit Court erred in adjudging cancellation of the patents therefor.**

**1st.** The lands in suit are odd-numbered sections within the primary limits of the grant made to the Southern Pacific Railroad Company by the Act of Congress

approved on March 3rd 1871 (16 Stats. 573); and it may be fairly stated as admitted that all the lands in suit were granted by that Act, unless they were within claimed limits of the Mexican Grant "Jurupa" at date of that grant, or date of definite location (1874) of that Company's railroad.

The bill alleges that all lands in suit are within limits of the Jurupa Grant as made by Mexico to Bandini (Tr., Vol. 1, p. 8); but that the patent issued in confirmation of that grant did not include any of those lands (Tr., Vol. 1, p. 9). The answer of these appellants denies that the Jurupa Grant claim ever included any of the lands in suit.

The evidence shows, and it is in nowise contradicted or disputed: That on September 25th 1852, Juan Bandini filed with the United States Commissioners for the adjudication and Settlement of California Land Claims, his petition praying that they " confirm in him his present claim," based on "A copy of the original grant" filed with the petition (Tr., Vol. 1, pp. 158, 159); that by decree filed on October 17th 1854, the said Commissioners confirmed the claim of Bandini, as presented and prayed (Tr., Vol. 1, p. 160); that on April 5th 1861, the United States District Court for the Southern District of California, on appeal by the United States from the Commissioners' decree, affirmed the decree appealed from (Tr., Vol. 1, p. 163); that on March 2nd 1875, pursuant to Mandate from the United States Supreme Court (Tr., Vol. 2, p. 507), on appeal by the United States from the said District Court decree of confirmation, it was by the said District Court ordered " that claimant proceed under the Decree of Con-

firmation heretofore entered herein as under Final Decree." (Tr. Vol. 2, p. 510); and on May 23rd 1879, the proper officers of the United States patented the "Jurupa" to Abel Stearns (successor in interest to Bandini), as surveyed in accordance with such final decree. (Tr., Vol. II. pp. 392 to 417).

No controversy, or dispute, as to claimed limits, or confirmed boundaries, was presented to the United States Commissioners, or to the District Court. To the contrary, the several decrees confirm, and the patent conveys, the "Jurupa" *as claimed and prayed,* and, admittedly, the lands in suit here are not within the calls of the patent nor limits of the approved survey. In other words, the lands patented as the "Jurupa" *are the identical lands claimed, prayed for, and confirmed as the "Jurupa";* hence to say that the lands in suit are not embraced by the patent, is to say that they are not and never were within the claimed limits of the "Jurupa".

**2nd.** It is true that in the case of the S. P. R. R. Co. vs. Brown, 75 Fed. Rep. 85-90, this Court held that certain lands in that suit were excepted from the Company's grant because within claimed limits of the "Jurupa" at date of railroad definite location—notwithstanding such lands were not within the patented limits of the "Jurupa". In that case, however, the decision was based largely on parol testimony to the effect that Abel Stearns ("Jurupa" patentee) claimed to broader limits than those disclosed by Bandini's *record claim.* After saying, on page 88 (75 Fed. Rep.) that "The question is not whether the lands were embraced in the Jurupa grant at the time the grant was made to the railroad

company, but whether they were at that time claimed to be within its boundaries.", this Court proceeded to discuss and decide that question on the parol testimony before it, as to what Abel Stearns had said to people about the extent, or breadth, of his claim. In this case at bar no testimony was introduced as to oral assertions, or claims, of the " Jurupa " claimants.

In **Tarpey vs. Madsen, 178 U. S. 215,** Madsen was permitted to prove by parol testimony that Olney, who filed pre-emption claim for the land in May 1869, alleging settlement thereon in April 1869, had in fact settled on the land prior to definite location of the railroad (October 20th 1868); Madsen claiming right to himself enter the land as public land, because excepted from the railroad grant by the occupancy of Olney at date of definite location, who thereafter filed his pre-emption claim in time. But the Court, holding that the *record claim* of Olney as to the date of his settlement must control, and that the " claim " of Olney could not be shown by parol, said (p. 228):

> " Recapitulating, we are of opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration or entry in the local land office. In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite; and while, as repeatedly held, the rail-

> road company may not question the validity or propriety of the entryman's claim of record, its right ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation; for if that be the rule, as admitted by counsel for defendant in error on the argument, the time will never come at which it can be certain that the railroad company has acquired an indefeasible title to any tract."

Here the "claim" of Bandini, as there the claim of Olney, is as made by the *claimant's record* thereof—hence it is sufficient to say that, admittedly, the lands in the suit at bar are not within the limits of the "Jurupa" as claimed by Bandini in the record made by him; because, as said in Tarpey vs. Madsen, while "the railroad company may not question the validity or propriety of the entryman's *claim of record*, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony."

**3rd.** In the case at bar no oral testimony was offered to show that Bandini, or others, ever claimed broader boundaries for the "Jurupa" than those described in the claim he filed with the United States Commissioners—nor is it disputed that the boundaries of the "Jurupa" as confirmed and patented are identical with the boundaries of the "Jurupa" as described by Bandini in the claim he filed and prayed confirmation of. The complainant's contention that title to the lands in suit here did not pass under the Southern Pacific grant, is based solely on the theory that the Reynolds map made in 1869 and approved by the Surveyor General for California in 1872, constituted a public record of claimed limits of the

"Jurupa" from the date of the Surveyor General's approval (1872) until rejected (in 1876) by the Commissioner of the General Land Office—intermediate which dates (1874) the Southern Pacific grant was definitely located. The Reynolds map enlarged the "Jurupa" beyond the boundaries given in Bandini's claim as filed, and beyond the boundaries fixed by the confirmation decree—in that way erroneously embracing these lands in suit. We say that the *status* of the lands in suit was at no time in anywise affected by the Reynolds map—because that map was at no time a public record, or other lawful record; for that:

**A.** The Reynolds map was made before the "Jurupa" claim was "*finally confirmed*"—hence made prematurely, and without lawful authority.

**B.** That map did not "*follow the decree of confirmation*" as to boundaries—hence was void and impotent; and

**C.** The Surveyor General had no lawful authority to approve the Reynolds map—hence his approval thereof was wholly without legal significance, or consequence.

**4th.** The "Jurupa", unlike Mexican grant claims generally, was not accompanied by any diseño, or map; nor did any withdrawal of lands made pending settlement of the "Jurupa" claim include these lands in suit. There having been no executive withdrawal, it follows that this land retained its status as "public land" until withdrawn, or reserved, from the public domain by the direction of Congress, or the operation of law.

Prior to the passage of the Act of July 1st 1864, in force when the Reynolds' survey of the "Jurupa" was

made, the powers and duties of the Surveyor General, in respect of the surveying of Mexican grant claims, were defined by Section 13 of the Act approved March 3rd 1851, entitled "An Act to ascertain and settle private Land Claims in the State of California" (9 U. S. Stats. 633). So far as it need be considered here, Section 13 of that Act reads as follows:

> "For all claims finally confirmed by the said Commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat of the survey of said land duly certified and approved by the Surveyor General of California, whose duty it shall be to cause all private claims which shall be *finally confirmed* to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims the said Surveyor General shall have the same power and authority as are conferred on the register of the land office and receiver of public moneys of Louisiana by the sixth section of the Act, 'to create the office of surveyor of the public lands for the State of Louisiana' approved third March, one thousand eight hundred and thirty-one."

The sense of which is, in so far as it relates to the Surveyor General's duties, that he was authorized and required to accurately survey the claims mentioned, and to plat, certify and approve such survey; and upon the presentation of such approved plat, with the certificate of confirmation mentioned, the General Land Office was required to issue a patent for the claim. But, it will be observed, until the claim was "*finally confirmed*," the Surveyor General had no authority to act at all; as the Act confined his authority of survey and approval to "claims finally confirmed."

No proceedings were undertaken while Section 13 of the Act of 1851 was in force. The first survey to be considered was that made by Reynolds, under authority of the Surveyor General's letter of January 14th 1869; and at that time the Act of July 1st 1864 (13 U. S. Stats. 332) was in force. This Act took away from the Surveyor General the authority conferred on him by the Act of 1851 to approve surveys of Mexican grant claims, and vested it in the Commissioner of the General Land Office. Sections 1 and 2 of this Act of 1864 relate to surveys and plats theretofore made; and Sections 6 and 7 prescribe the procedure for all claims not then surveyed. Omitting, for easier understanding, the parts of no concern here, and Sections 6 and 7 are as follows:

> "Section 6. And be it further enacted, That it shall be the duty of the Surveyor General of California to cause all the private land claims *finally confirmed* to be accurately surveyed and plats thereof to be made, whenever requested by the claimants. * * * * Whenever the survey and plat requested shall have been completed and forwarded to the Commissioner of the general land office, as required by this Act, the district court may direct the application of the money" etc.
>
> "Sec. 7. And be it further enacted: That it shall be the duty of the Surveyor General of California, in making surveys of the private land claims *finally confirmed, to follow the decree of confirmation* as closely as practicable, whenever such decree designates the specific boundaries of the claim. * * * And it shall be the duty of the Commissioner of the general land office to require a substantial compliance with the directions of this section before approving any survey and plat forwarded to him."

The procedure prescribed by these sections for the survey of claims, like that provided by the Act of 1851,

related to "*finally confirmed*" claims; and until a claim was finally confirmed, the Surveyor General had no lawful authority to survey it at all—and any survey made prior to such final confirmation was a mere personal act, without legal significance. The claim, after final confirmation, was to be surveyed by the Surveyor-General in accordance with the decree—not otherwise, and, admittedly, the Reynolds survey was not in accordance with any decree. After survey the Surveyor General was required to send a plat thereof to the Commissioner; and it was specifically provided that the Commissioner "should require a substantial compliance" by the Surveyor-General, with the provisions of Section 7, requiring the survey to be made in accordance with the final decree. And, as before said, the authority to approve the survey, conferred on the Surveyor-General by the Act of 1851, was taken away from him and vested in the Commissioner by Section 7 of the Act of 1864; hence the Surveyor-General's approval carried no more legal significance than would the approval thereof by a Post-master.

The Surveyor-General had no lawful authority to approve the survey at all—whether correctly or incorrectly made. His duty was to forward the survey to the Commissioner, whose duty it was to approve or reject it (Secs. 6 and 7, Act 1864). On May 13th 1876, when the plat reached him, the Commissioner disapproved and rejected it (Tr., Vol. 1, p. 336), and on May 23rd 1879, approved and patented the Minto survey—made in November 1878; and such was the uniform ruling of the Interior Department until reversed on authority of this Court's decision hereinbefore referred to (75 Fed. Rep.

85). In the case of **S. P. R. R. Co. vs. Mackel, 11 L. D. 493,** Secretary Noble said:

> " The land reserved by the Jurupa grant was that included within the boundaries of the claim as confirmed, i. e., within the boundaries shown by the record of the juridical possession. These boundaries were determined on the ground by the survey of 1878 —hence the only land reserved by said private grant was that within that survey. To render a survey made under the Act of July 1, 1864, effective, it was necessary that it should be approved by the Commissioner of the General Land Office. The survey of this grant made in 1869, never received the approval of your (Commissioner's) office or of this department—and in fact had not, at the date the grant to the railroad company took effect, been approved by the Surveyor-General. Such a survey was not effective to except these tracts in controversy from the operation of the latter grant."

Again, in **Duncanson vs. S. P. R. R. Co., 12 L. D. 666,** Secretary Chandler, after discussing the doctrines of Newhall vs. Sanger (92 U. S. 761), Doolan vs. Carr (125 U. S. 613), and U. S. vs. McLaughlin (127 U. S. 428), said:

> " The only question which remains to be answered is this: Was the tract claimed by Duncanson within the specified or intended limits of the Jurupa grant? A negative answer would seem to be sufficient, based upon the fact that the survey, upon which a patent issued, excluded said tract. If it should be held that an erroneous survey of the boundaries of a private grant which embraced a tract of land a few rods outside the actual boundaries, could reserve the land from other appropriation, it must be held, that a like survey which embraced land a few miles outside the boundaries would also reserve said land in like manner, a doctrine which is emphatically denied by the Court in the cases herein cited. The survey

made in 1869 under the provisions of the Act of July 1, 1864, did not operate as a segregation of the land, for in order, to become thus operative, it was necessary that it receive the approval of the Commissioner of the General Land Office, and had it been approved, patent must have issued. Said survey, however, was not approved, and the segregation was not made."

The Reynolds map did not show, nor did it purport to show, boundaries to which Bandini, or his successor Abel Stearns, or any other person for that matter, claimed the "Jurupa" to extend; and in his letter of May 13th 1876, rejecting that map, the Commissioner, speaking of Reynolds and his map, said, he "has, in several instances, in fixing his monuments and directing his lines, discarded the plain requirements of the decree." (Tr. Vol. 1, p. 331). For this reason the Reynolds map was rejected—and the rejection was purely *ex parte,* for no person interested in the "Jurupa" claimed, before the United States Commissioners, in the District Court, or in the Land Department, that the lands of this suit were within limits of the "Jurupa."

Reynolds made an unauthorized survey, which did not appear nor purport to define the boundaries of the "Jurupa" in accordance with any decree, nor according to the claim of any person; and the Land Department, acting within itself, without suggestion from parties in interest, rejected the Reynolds map and caused a new, and correct, survey and map to be made by Minto. The boundaries of the "Jurupa" were identical at all times, and never did embrace this land in suit; nor did any owner in the "Jurupa" ever claim this land to be within the limits thereof—in so far as shown in this case.

In other words, Bandini asked for what he wanted, defined the boundaries of his claim in his petition, no person disputed or denied the boundaries thus defined, the decrees confirmed his claim to the boundaries defined —and the patent follows the final decree; so that Bandini got what he asked for, and all he asked for or at any time claimed.

II.

**The Act of March 2nd 1896, gratuitously and unconditionally confirmed the title conveyed by the patents in suit, to all lands at that time held by purchasers in good faith from the Southern Pacific Railroad Company; from which it follows that those patents could not be cancelled in this suit, whether true or untrue that they were erroneously issued.**

**1st.** While several of the tracts in suit were not sold by the Southern Pacific Railroad Company to other purchasers, all lands in suit are covered by the trust deeds given by that Company to its co-appellants herein.

The Act of March 3rd 1887 (24 U. S. Stats. 556) contains a proviso "That a mortgage or pledge of said lands by the Company shall not be considered as a sale for the purpose of this Act;" thus excluding mortgagees, and land holders under deeds of trust given to secure the payment of debts, from the class of persons to whom the benefits of that Act are extended. No such proviso, however, is to be found in the Act of March 2nd 1896 (29 U. S. Stats. 42)—the first section of which provides, without restriction or exclusion as to or of persons, that

> "No patent to any land held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

In **United States vs. Winona, etc., 165 U. S. 481,** it was held that

> "The Act of 1896, confirming the right and title of a *bona fide* purchaser, and providing that the patent to his land should not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser' has, nevertheless, purchased in good faith from the railroad company."

The title confirmed is the identical title sought to be conveyed by the patent to the railroad company; and the Act of 1896 takes away the power of courts to cancel any patent for such land. The grant considered in the Winona case was made to the State of Minnesota, and not directly to the railroad company; and it provided that the lands should be conveyed by certification, instead of by patent. On page 477 of the opinion (165 U. S.), interpreting the provisions above quoted from the Act of March 2nd 1896, it is said:

> "We are of the opinion that Congress intended by the sentence we have quoted from the Act of 1896, to confirm the title which in this case passed by certification to the State. * * * Given a *bona fide* purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the government to disturb it."

We submit that the bond-holders under the Trust Deeds are *bona fide* purchasers of all patented lands; and, that, therefore, the title sought to be conveyed by those patents is confirmed, and the court's power to cancel those patents cut off, by the Act of 1896. Both Trust Deeds are in the nature of common law mortgages, conveying the legal estate with a clause of defeasance. Each provides that

the lands may be sold from time to time, and the full amount received therefor applied to the payment of the bonds secured; and in case of default the trustees are to dispose of the unsold lands, and apply the proceeds to payment of the bonds. It is settled law that such instruments convey legal title—and are not mortgages. **(More v. Calkins, 95 Cal. 436,** and cases cited. See, also, respondents' authorities in **Grant v. Burr, 54 Cal. 299.)**

If these views are correct, then no patent for any land in suit can be canceled, as all the lands are covered by the trust deeds. (Tr., Vol. 2, pp. 511, 560).

**2nd.** As before said, the first section of the Act of March 2nd 1896, (29 Stats. 42) provides that

> "No patent to any land held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

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This decision in the Winona case is cited with approval and followed in **United States v. S. P. R. R. Co., 184 U. S. 49.**

Persons who bought under credit contracts, paying part only of the price, are protected by section 3 of the Act of March 2nd 1896, which speaks of "*bona fide* purchasers * * * by deed or contract or otherwise." **(United States v. S. P. R. R. Co., 117 Fed. Rep. 544.)**

Congressional Acts granting lands to aid in the construction of railroads, *are laws* as well as conveyances; hence, prior to passage of the Act of March 3rd 1887, good faith purchasers, for full value, of the lands patented under such land grants, could not defend against cancellation of patents erroneously issued, at suit of the United States—*because of the conclusive presumption that they knew the law,* and bought with notice. Given a patent erroneously issued to a railroad company, and the United States could procure cancellation thereof, and full recovery of its own, without inquiry as to whether the railroad company had or had not attempted to sell or convey such lands—as the law was prior to the Act of March 3rd 1887. **(Pom. Eq. Jur. 745; United States v. Winona etc.,**

**165 U.S. 463, 483; Simmons Cr. Coal Co. v. Doran, 142 U. S. 417; Nesbit v. Ind. Dist., 144 U. S. 610; Lytle v. Lansing, 147 U. S. 59; Sutliff v. Lake Co. 147 U. S. 230)** In other words, prior to March 3rd 1887, questions or obligations arising out of attempted sales by railroad companies of lands erroneously patented to them, were contractual matters between vendor and vendee, respecting which the United States had neither interest nor concern.

Mindful of this right of full recovery, by cancellation of erroneous patents, where railroad companies had attempted to sell or convey the lands thereof, Congress, in Section 2 of the Act of 1887, called on the Secretary of Interior to report such erroneous patents to the Attorney-General, and declared that "it shall thereupon be the "duty of the Attorney-General to commence and prose-"cute in the proper courts the necessary proceedings to "cancel all patents for such lands and to restore the "title thereof to the United States." Upon cancellation of the erroneous patents, and restoration of title to the United States, the lands would resume their original *status* as public lands, subject to disposal by Congress; and, of course, cancellation of such patents and restoration of title in the United States, placed the United States in *statu quo*—for which reason, if for no other, the United States could not, after recovery of title, also recover from the railroad company the cash value of, or money received from its vendee in the attempted sale and purchase of, the restored land. But Section 4 of the Act of 1887 undertakes to provide for recovery of the land from the railroad companies, and, in addition thereto,

recovery from the same company of one and one-quarter dollars per acre for the lands thus taken from it; in other words, *to recover the lands and also recover the value of the lands.*

This section (4) provides that, after cancellation of the railroad company's patents, and full recovery of the lands, the lands shall be conveyed by new patent to such persons of the class specified, as may make requisite proofs in the land office—and thereupon the Attorney-General shall proceed to collect one and one-quarter dollars per acre for such lands, from the railroad companies; notwithstanding the railroad company may have conveyed the land, by quit-claim, for ten cents per acre. It is true that by amendment approved on February 12th 1896 (29 U. S. Stats. 6) it is provided that where lands are sold by credit contract, for partial payment less than one and one-quarter dollars per acre, the amount to be recovered from the railroad companies shall be the partial payment received; but this leaves the provision for collecting from railroad companies one and one-quarter dollars per acre for all lands erroneously patented to and sold by them for full payment made, still in force—except in so far as the Act of March 3rd 1887, is repealed by the Act of March 2nd 1896.

As before said, the Act of March 3rd 1887, provided for the issue of a *new patent* to good faith purchasers, after cancellation of the railroad patents, upon the making of prescribed proof in the land office—and for the collection, thereafter, from railroad companies, of the value of the land. In order, therefore, to maintain this as an action under the Act of 1887, to recover one and one-quarter

dollars per acre for lands in suit sold by the defendants, it was essential, in a jurisdictional sense, to plead and prove prior cancellation of those patents and issue of new patents to good faith purchasers who theretofore made requisite proofs in the land office; and as such is not the pleading or proof here, it cannot be said that the money demand here is sought to be recovered under the Act of 1887.

The first section of the Act of March 2nd 1896, however, destroyed whatsoever right of action (if any) to recover money value for the land was created by the Act of 1887; for, as before shown, unless and until the railroad patent had been canceled and a new patent issued to a good faith purchaser, the United States could have no such right of action, under the Act of 1887—and the Act of March 2nd 1896, declares that "no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled." In other words, before happening of the essential conditions precedent upon which right of action to recover money value of the lands depended, under the Act of 1887, the happening thereof was rendered impossible by passage of the Act of March 2nd 1896.

The provision in the Act of March 2nd 1896, that "the right and title of such purchaser is hereby confirmed," did not create a new or independent estate—thus leaving the Government's right of action intact as to the company's wrongful conveyance of some other estate in the same land. It sanctioned, ratified and confirmed the identical estate which the patent purported to convey; and to give force to confirmation is to perfect all imperfections and right all wrongs. **(Am. & Eng. Enc. of Law, Vol. 3,**

**p. 498; Anderson's Dic. of Law, p. 224; Abbott's Law Dic., Vol. 1, p. 263; Black's Law Dic. p. 249.)**

For these reasons, among others, and because the lands in suit were patented to and sold by the defendant prior to the passage thereof, it cannot be said that this action is founded on the Act of March 2nd 1896. Certainly Congress could not, on March 2nd 1896, create a right of action for the United States, to arise out of patents issued prior to that date.

III.

**Were it true that the patents complained of were erroneously issued, still complainant is not entitled to recover any price for lands in suit sold by these appellants, because (a) by the Act of March 2nd 1896, Congress gratuitously and unconditionally confirmed the title thus sold and conveyed; (b) the demand for such payment is in assumpsit, at law; and (c) the Southern Pacific Railroad Company has not received, these lands included, the quantity of land granted by its granting Act.**

As before shown, but for provisions of the Act of March 2nd 1896, attempted sales by the Southern Pacific Railroad Company of lands erroneously patented to it, did not stand in the way of cancellation of the patents—because such purchasers (prior to March 2nd 1896) were *mala fide* not *bona fide,* purchasers. Cancellation of the patents would have fully restored the title, and placed the United States *statu quo.* This being true, the United States had no right of action, prior to March 2nd 1896, to recover the value of lands thus sold; because such

right of recovery is an equitable alternative, dependent on inability to recover the title because of defendant's acts —sale to a *bona fide* purchaser, for instance. With cancellation of the patents, and recovery of title, all interest and concern of the United States ended. Whether the Southern Pacific remained liable for the money received from sale of the land, presented a question between vendor and vendee, with which the United States had no concern.

With full power to cancel the patents, and thus recover the lands, Congress enacted that the patents should not be canceled, and that vendor must pay the United States the specified price for the lands—*notwithstanding defendant sold the lands for less.* In other words, if the Southern Pacific sold the land for full payment of one-half dollar per acre, to a person whose title stands confirmed by the Act of March 2nd 1896, the Southern Pacific must pay the United States one and one-quarter dollars per acre, if the provisions of that Act are enforceable.

**(a)** The Act of March 2nd 1896, was not passed at appellants' request. The confirmation it makes, while entirely *ex parte* and unsolicited, is not on condition that the railroad companies pay, or promise to pay, any sum; but is absolute and unconditional. That Congress had the right to confirm the title of *mala fide* purchasers (characterizing them *bona fide* purchasers, or what-not), unconditionally or upon conditions to be accepted and performed by such purchasers, is admitted; but Congress is without constitutional power to adjudge or decree that railroad companies shall, because of such confirmation, be debtors of the United States. Whether the railroad com-

panies are debtors of the United States, and if they are in what amount, are questions for the judiciary to determine. If Congress has the power to impose a debt of one dollar per acre on railroad companies, it has equal power to impose a debt of one thousand dollars per acre. This Act is an attempt, by retroactive legislation, to establish a debt and adjudge the amount thereof. That such legislation is attempted usurpation of judicial authority, and a travesty on the constitutional right to be tried by the "law of the land," see **Cooley on Constitutional Limitation (III) page 124; United States v. Klein, 13 Wall. 147; United States v. Union Pac. R. R. Co., 98 U. S. 606.**

The United States had no right of action against defendant for the value of these lands prior to March 2nd 1896; and if it now has such right of action it was created by that Act. In other words, Congress, by its mandate, directed the courts to adjudge railroad companies debtors of the United States at rate of so much per acre. The essentials of a contract, *sufficient consideration and assent*, are wanting **(Vol. 1, Sec. 1, Parsons on Contracts).** Even had there been an express promise to pay, made after passage of the Act, no legal obligation would have attended. It would have been a *nudum pactum* based on past consideration, and could not have been enforced. A past consideration is not regarded in law as a valuable consideration—it is simply a gratuity. **(Vol. II, Sec. 16, Parsons on Contracts.)**

In the case at bar there was neither promise nor request from defendant, and where there is no sufficient consideration to support an express promise, a promise will not be implied.

**(b).** The real purpose of this suit is to procure a money judgment against the Southern Pacific for an amount equal to one and one-quarter dollars per acre for lands patented to and sold by it, but on the face of the bill it appeared to be a bill to cancel patents, with prayer for alternative relief in money if such concellation were barred by the Act of March 2nd 1896.

Equity jurisdiction on grounds of discovery, ended with the filing of defendant's answer **(Tiedman on Equity Jurisprudence, 1893, Sec. 550)**, besides bills of discovery have become obsolete in modern practice **(Preston v. Smith, 26 Fed. Rep. 884; Ex-parte Boyd, 105 U. S. 647; Paton v. Majors, 46 Fed. Rep. 210; Riopelle v. Waldbridge, 26 Mich. 102; United States v. McLaughlin, 24 Fed. Rep. 823).**

Equity jurisdiction for cancellation of patents, appearing on the *face of the bill*, was shown by the *proofs not to exist* as to any of the lands sold by appellants; and an action to recover the value in money of those sold lands, cannot be joined with a suit to cancel patents for other lands **(Cherokee Nation v. S. K. Ry. Co., 135 U. S. 641; Scott v. Neely, 140 U. S. 107).**

The case proved shows no ground of equitable jurisdiction, as to the several tracts of land sold by appellants; so the bill should be dismissed *sua sponte* as to those lands.

In **Mills v. Knapp, 39 Fed. Rep. 592,** the plaintiff in his bill claimed (as in the case at bar) an exact sum, and the defendant pleaded to the merits. It was insisted that the defendant by pleading to the merits had lost the right of objecting for the first time to the jurisdiction of equity at the hearing. But the bill was dismissed, be-

cause the plaintiff had an adequate remedy at law. Blatchford, J. said:

> "Besides this, the plaintiff, on the face of his bill has a plain, adequate, and complete remedy at law. * * * No other equitable relief is asked. In such a case it is not necessary that the objection should have been taken *in limine* in the answer. It is taken at the hearing, and that is sufficient. This is not a case where it is competent for a court of equity to grant the relief asked. Reynes v. Dumont, 130 U. S. 354; Kilbourn v. Sunderland, 130 U. S. 505. It is governed by the rule laid down in Lewis v. Cocks, 23 Wall. 466, where the court, finding the case to be an action of ejectment in the form of a bill in Chancery, ordered the bill to be dismissed, although the objection was not made by demurrer, plea, or answer, or suggested by counsel; saying that, as it clearly existed it was the duty of the court *sua sponte* to recognize it, and give it effect. It results from these views that without inquiring into the merits of the case, the bill must be dismissed with costs."

To the same effect is **Litchfield v. Ballou, 114 U. S. 192; Killian v. Ebbinghaus, 110 U. S. 573; Perego v. Dodge, 163 U. S. 160).**

As to all lands sold by the Southern Pacific, the case at bar is a *common law action of assumpsit* to recover a debt of specific amount (the number of acres multiplied by the price per acre), for which there would be "a plain and adequate remedy at law", if there be such debt. If complainant has a lawful demand for the value of lands the Southern Pacific has sold, the remedy is just as efficient at law as in equity **(Oelrichs v. Spain, 15 Wall. 227). Clark on Contracts, page 764,** under the heading "Money received for the use of another", states the rule as follows:

"317. Whenever one person has money to which, in equity and good conscience, another is entitled, the law creates a promise by the former to pay the latter, and the obligation may be enforced by assumpsit."

In **Gaines v. Miller, 111 U. S. 397,** it was held:

"Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. (Citing a list of authorities) The remedy at law is adequate and complete."

For these reasons we say the bill should be dismissed as to all lands sold to persons whose title is confirmed by the Act of March 2nd 1896.

**(c).** It is stipulated (Tr. Vol. 2, p. 488) that the Southern Pacific has not received the full quantity of land promised in its grant.

In **United States vs. Winona, 165 U. S. 482,** among other reasons assigned by the Court why the United States should not recover the value of lands erroneously patented to and sold by the company to *bona fide* purchasers, is the following:

"But lastly, and chiefly, it does not appear from the record either that the railroad company received an excess of lands, or has ever received (these lands included) the full quantity of lands provided in the grant."

It is respectfully submitted that the bill should be dismissed.

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